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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 529

W. M. WEBB, INC. ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	14
Appendix A	1a
Appendix B	9a
Appendix C	11a
Appendix D	12a

CASES

Cape Shore Fish Co. v. *United States*, 330 F.2d 961	5, 11
Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212	9
Detroit Trust Co. v. *The Barlum*, 293 U.S. 21	13
Enocks v. *Williams Packing Co.*, 370 U.S. 1	10, 11
Panama R. R. Co. v. *Johnson*, 264 U.S. 21	12, 13
S.E.C. v. *Chenery Corp.*, 318 U.S. 80	10
United States v. *W. M. Webb, Inc.*, 397 U.S. 179	1, 11
Weade v. *Dichmann, Wright & Pugh*, 337 U.S. 801	10

STATUTES AND REGULATIONS

	Page
Internal Revenue Code of 1954:	
Section 3121(d)	3
Section 3306(i)	3
Title 26 U. S. Code:	
Section 3100	3
Section 3306	3
Section 3121	3
Section 3121(d)	3
Section 3306(l)	3
Title 28 U. S. Code:	
Section 1254(l)	2
Section 1346(a)	3
Treasury Regulations:	
Section 31.3121(d)-1	3
Section 31.3306(i)-1	3

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The petitioners in these consolidated cases[1] petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit following remand from this Court "for proceedings consistent with this opinion." [397 U.S. 174, 194]

OPINIONS BELOW

The primary opinion of the Court of Appeals (App. A, pp. 1a-8a) is reported at 402 F.2d 956.[2] The opinion

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[1] The petitioners here were respondents in *United States* v. *W. M. Webb, Inc.*, 397 U.S. 179 (1970), cert. granted, 394 U.S. 996, No. 63, October Term, 1969.

[2] The Court of Appeals on remand (Appendix B p. 9a) as a basis for decision incorporated by reference a portion of its primary opinion reversed by this Court. The Court of Appeals' primary opinion is reprinted for easy reference.

of the Court of Appeals following remand from this Court (Appendix B, 9a-10a) and the order denying petitioners' petition for a rehearing (Appendix C, p. 11a) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals following remand from this Court was entered on April 27, 1970. The order denying the petition for a rehearing was entered on June 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The relief sought here is a determination of whether or not the Court of Appeals failed to follow the mandate of this Court when it instructed the District Court to dismiss the complaints rather than consider a motion for a new trial. Since no other court has jurisdiction to determine the meaning and effect of this Court's mandate, it follows that only this Court can rectify the error below. Since the primary issues have been settled in this Court's opinion, 397 U.S. 179, correction of the Court of Appeals' misconstruction of the mandate and opinion of this Court would not require plenary consideration or argument.

QUESTIONS PRESENTED

1. Were petitioners entitled to an opportunity to move in the District Court for a new trial following this Court's reversal and remand to the Court of Appeals "for proceedings consistent with this opinion?"

2. Did this Court's mandate and opinion permit the Court of Appeals to terminate the case by instructing the District Court to dismiss the complaints or were further proceedings on petitioners' motions for a new trial contemplated?

3. Under this Court's mandate remanding "for proceedings consistent with this opinion," did the Court of

Appeals usurp the function of the District Court when it ordered petitioners' complaints dismissed?

4. Whether the long recognized common law relationship of principal and independent contractor has been outlawed by the application of maritime standards to the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3100 et seq. and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3306, et seq.?

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3121 and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121 (d)-1 and 31.3306(i)-1 of the Treasury Regulations on Employment Tax are printed in Appendix, *infra*, pp. 12a-15a).

STATEMENT

The petitioners own boats which are used in commercial fishing. Their fishing is carried out through contractual arrangements with boat captains who man, provision and manage the boats in their day-to-day operations.

The petitioners filed employment tax returns under the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) and paid the employers' share of taxes due on the earnings of captains and crews.

In the District Court, under the authority of 28 U.S.C. § 1346(a), the petitioners sued the respondent for refunds of their portion of the employment taxes asserting erroneous payment and unlawful collection thereof because the captains and crewmen on their boats were not their "employees" as that term is defined by the provisions of § 3121(d)[3] (FICA) and § 3306(i)[4] (FUTA) of the Internal Revenue Code of 1954.

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[3] Appendix p. 12a.

[4] Appendix p. 12a.

The District Court, sitting without a jury, determined that the captains and crews were not petitioners' employees for tax purposes. [271 F. Supp. 249, and 397 U.S. 179, 181] The trial court noted that the term "employee" for tax purposes under the FICA and FUTA was defined as any individual who has employee status under the "usual common law rules" applicable to a master-servant relationship. [397 U.S. at 181]

The general criteria of the common law which the Treasury Regulations[6] describe were interpreted and applied to the facts by the District Court in accordance with standards pertaining to land-based occupations. The District Court rejected the application of maritime standards to these fishing ventures asserting the respondents' contention for its application was "without merit." [397 U.S. at 181]

The District Court found that the degree of control exercised by the petitioners over the fishing activities was not sufficient under the common-law standards governing land-based occupations to create an employer-employee relationship between the petitioners and the captains and crewmen. [397 U.S. at 181-182] Judgments were entered for the petitioners.

On appeal, the Court of Appeals affirmed the judgments and "agreed with the District Court that the statutes' prescription of 'common law rules' barred the application of maritime standards." [397 U.S. at 182]

But in a *dictum*, the Court of Appeals went on to say that—"[I]t is clear that under maritime law the captain is the agent of the owner . . . and the crew hands are employees" and that "[i]f we were free to apply maritime law as a test of the employer-employee relationship we would reverse the decision of the District Court." [402 F.2d 956, 959, Appendix p. 6a, and 297

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[6] Appendix pp. 13a-15a.

U.S. at 182] In rejoinder this Court said: "We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score." 397 U.S. at 182 ftn.4.

This Court noted that the lower courts' rulings conflicted with the approach of the Court of Claims in *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961. The latter held fishermen were employees under these statutes by applying to the facts the standards of maritime law. [397 U.S. at 182]

Certiorari was granted to resolve the conflict and to clarify the application of the FICA and the FUTA to maritime workers. [397 U.S. at 182]

This Court concluded that the Court of Appeals erred in declining to judge the status of the fishermen against the standards of maritime law, rather than land-based law. The judgment was reversed and the case was remanded to that Court for proceedings consistent with this Court's opinion. [397 U.S. at 194]

Following the remand, the Court of Appeals terminated the litigation by directing the District Court to dismiss the petitioners' complaints. [Appendix p. 10a] In doing so the Court of Appeals said:

> "The Supreme Court held that this Court 'erred' in declining to judge the status of the captains and crewmen against the standards of maritime law.' This holding coupled with our earlier conclusion that under maritime law the captain is the agent of the owner and the crew hands are employees, leaves no room for further argument as to the appropriate disposition of this case." (Appendix p. 10a)

Petitioners filed a petition for a rehearing following the Court of Appeals' judgment instructing the District Court to dismiss the complaints. Petitioners' argued that, (1) this Court's mandate did not carry the slightest indication that the judgment winners below be deprived

of a chance to move for a new trial; (2) that this Court did not share the confidence expressed by the Court of Appeals that under maritime standards "the captain is the agent of the owner and the crew hands are employees," (3) that the new "maritime standards" test announced by this Court required that it be applied initially by the District Court in a further hearing, and (4) that the Court of Appeals usurped the function of the trial court in assuming the facts to be developed and applied to maritime standards would require dismissal of the complaints.

Additionally, the petitioners on rehearing, presented grounds to the Court of Appeals for a new trial and urged that the record revealed a new trial issue (application of common law rules governing maritime standards) that had not been resolved by the trial court. The petition for rehearing was denied. [Appendix p. 11a]

REASONS FOR GRANTING THE WRIT

1. THIS COURT'S MANDATE AND OPINION ON REMAND DID NOT CARRY THE SLIGHTEST INDICATION THE PETITIONERS (JUDGMENT WINNERS BELOW) BE DEPRIVED OF THE OPPORTUNITY TO MOVE FOR A NEW TRIAL.

Unless the case is sent back to the District Court the petitioners, who were judgment winners in two courts below, will have been denied their day in court.

This Court's mandate and opinion disclosed that the approach of both the District Court and Court of Appeals below was based on erroneous standards of law. [397 U.S. at 194]

Contested issues of fact were resolved favorably to the petitioners at the trial and affirmed on appeal.

There was no suggestion by this Court on reversal and remand that rebuttal evidence had been offered by re-

spondent to indicate that the factual issue of *control* was foreclosed from consideration by the trial judge on a new trial.

The evidence was therefore sufficient to present to the trier of fact the issue whether petitioners exercised a sufficient degree of control over the fishing activities to create an employer-employee relationship with the captains and crewmen under the FICA and the FUTA according to maritime standards. At trial, the District Court held the petitioners did not exercise a sufficient degree of control over the fishing activities under the common law rules governing land-based standards to create an employer-employee relationship between the petitioners and the captains and crewmen. [397 U.S. at 181-182] The application of land-based standards was wrong; maritime standards should have been applied. [397 U.S. at 194] The District Court never considered whether the facts proved the fishermen were or were not employees under the common law rules governing maritime standards.

Against such a procedural background the Court of Appeals, on remand from this Court, came to a different conclusion on the facts by the application of maritime standards as a matter law.[6] This necessarily involved a *de novo* consideration of the facts by the Court of Appeals on a cold record and subjected the result to all the imperfections inherent in any decision arrived at under such handicaps. Here those handicaps were magnified by the fact that the case was tried to the court without a jury and this necessarily has some tendency

[6] "It [Court of Appeals] reviewed the facts and observed that 'it is clear that under maritime law the captain is the agent of the owner . . . and the crew hands are employees' and that '[i]f we were free to apply maritime law as a test of the employer-employee relationship we would reverse the decision of the District Court.'" [397 U.S. at 182] This Court noted the foregoing and said: "We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score." [*Id.* at ftn. 4]

to steer the facts toward the issues that become uppermost in the trial court's mind as the case progressed away from the issues upon which this Court reversed the trial court, as well as the Court of Appeals. The result is a record that cannot support the Court of Appeals' decision instructing that the complaints be dismissed.

On a new trial whole new areas of evidence will come into play. Petitioners' and the trial court's approach to the new trial will be different. The application of maritime standards (rather than land-based standards) to these seafaring ventures will encompass considerations of customs, usages, traditions, practices and habits of mariners which had no relevance to the land-based theory employed. The sources of information from which evidence will be drawn will range widely in maritime commerce none of which were called upon in the previous trial. Under this Court's definition of maritime standards, comparisons may fairly be drawn between the democratic nature of these fishing ventures, including the traditional independence of fishermen on the one hand, and the restrictive rules and practices which exist, for example, between the owners of cargo and passenger vessels and their personnel on the other. No effort was made to adduce such evidence in the trial below.

The areas and exercise of discretion by the captains, as seafarers, will take on new significance under maritime standards than that previously developed according to land-based occupations. More important the factual issue of control under the common law rules governing maritime standards, will call for different treatment by the petitioners and the trial court than was given it under land-based standards. This Court's emphasis on the factual issue of control alone[7] should allow petitioners

[7] "Control is probably the most important factor under maritime law, just as it is under the tests of land-based employment." [397 U.S. 179, 192]

an opportunity in a new trial to correct their error and fill in the gaps of proof missing because of having applied the wrong theory of law.

If the case had been tried to a jury and the sole error was the application of the wrong legal theory and if there were factual issues to be resolved, the case would unquestionably have been remanded for a new trial. The trial court would then have instructed the jury to decide the factual issue of control in the light of "an established network of rules and distinctions that are practically suited to the necessities of the sea," [397 U.S. at 191] and to consider the unusually broad discretion vested in maritime-workers by virtue of the nature of their seafaring activity [397 U.S. at 191], as well as the factors defining "employee" in the Regulation. [397 U.S. at 189 and 193]

On a trial to the judge, as here, there are no instructions, of course, but the same questions of fact must be resolved.

The determination of the issue of control exercised by the petitioners over the captains and crewmen is vested exclusively in the judge who tried the case. That the trial court is the more appropriate tribunal to determine it is beyond question. The Court of Appeals is not equipped to try factual issues as trial courts are. The trial judge who heard the evidence in the original case has a vast store of information and knowledge about it that the Court of Appeals could not get from a cold printed record. Thus the trial judge can base the broad discretion granted him in deciding the factual issues in a new trial on his own knowledge of the evidence in the light of the correct legal theory "in a perspective peculiarly available to him alone." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216. The Court of Appeals decision on remand ordering the District Court to dismiss the complaints is out of harmony with this principle.

The District Court's conclusion that maritime standards were "without merit" left the record bare of any evidence of control exercised by the petitioners over the fishing operations in judging the status of the fishermen under the common law rules governing maritime standards. Following reversal and remand by this Court, the Court of Appeals usurped the function of the trial court when it decided the factual issue of control and concluded the fishermen were employees for tax purposes. On this score, this Court said in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 at 88:

> "But it is also a familiar appellate procedure that where the correctness of the lower court decision depends upon a determination of a fact which only a jury could make, but which has not been made, the appellate court cannot take the place of the jury."

On a trial to a judge, the same questions of fact must be decided by him.

But in no event may an appellate court find facts and draw conclusions where no such fact was tried in the trial court and the record is devoid of evidence from which such question may be resolved.

"As there were suggestions in the complaints and evidence" of a basis for the refunds claimed by the petitioners from the respondent, logic and fairness require the case to be sent back to the District Court to allow the petitioners to correct their error and fill in the gaps of proof. See, *Weade* v. *Dichmann, Wright & Pugh*, 337 U.S. 801, 809.

2. The Court of Appeals decision following remand conflicts with the principles announced by this Court in Enochs v. Williams Packing Co., 370 U.S. 1 as well as United States v. Webb, 397 U.S. 179

The effect of the Court of Appeals' judgment on remand is to foreclose, as a matter of law by the appli-

cation of maritime standards, any relationship between boat owners and their fishermen except that of employer and employee. (Appendix, pp. 9a-10a)

To the contrary, this Court held that the "employee" status of commercial fishermen under the FICA and FUTA was a question of fact to be determined after consideration of various factors including "degrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3. *U.S.* v. *Webb*, 397 U.S. 179, 189, 193 and ftn. 20.

Also, this Court concluded in *Webb* [397 U.S. at 194] that there was no rule of thumb for determining employment relationships for tax purposes and that the maritime standards described in the opinion "cannot be intended to provide a workable test, complete in itself, displacing the common-law rules Congress so carefully tried to preserve. Rather, the regulation provides a summary of the principles of the common law intended as an initial guide for the determination, required by the first sentence of the regulation, whether a relationship 'is the legal relationship of employer and employee.'" [397 U.S. at 194; see also Part II of the *Webb* opinion, 397 U.S. at 182-190 confirming the congressional requirement that the common law rules governed the relationships here.]

This Court's approval of the approach to this problem in *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961 [397 U.S. at 182], is further evidence that the issue is one of fact when judging the fishermens' status. At 330 F.2d 965, *Cape Shore* said:

> "The relationship is to be ascertained by an overall view of the entire situation, and not by a rule of thumb or by the presence or absence of a single factor. The result in each case must be governed by the special facts and circumstances of the case itself."

The Court of Appeals decision on remand dismissing the complaints is premised on an untenable ground. The result denies petitioners an opportunity to seek a new trial to which they are entitled.

3. THE COURT OF APPEALS SEEMS UNAWARE THAT THE COMMON LAW RULES EMBRACED IN THE FICA AND FUTA ARE INCLUDED IN THE MARITIME STANDARDS CONGRESS INTENDED TO BE APPLIED WHEN DETERMINING THE "EMPLOYEE" STATUS OF MARITIME WORKERS.

The Court of Appeals said:

> "It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA." (402 F.2d 956, 959, Appendix p. 6a)

This was clearly wrong. [397 U.S. at 190, 191 and 194]

The Court of Appeals nevertheless adhered to this principle when it assumed authority to direct the dismissal of the complaints. The Court of Appeals ignored this Court's explication of the integration of the common law rules embraced in the FICA and FUTA into the maritime law.

This Court observed that the 1939 amendments to the Social Security Act extended the statutes' coverage to maritime employees. [397 U.S. at 190, 192 at ftn. 16] The Court of Appeals failed to realize that the FICA and the FUTA, *en toto*, were put to sea.

Under this Court's doctrine announced in *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, like other Acts affecting maritime workers, the FICA and the FUTA added a new definition of "employee" to the body of maritime law, confined, however, to determinations of seafarers' tax liability.

In its remand decision, the Court of Appeals' adherence to "employee" status according to principles of the old general maritime law ignored this Court's recognition of the "power in Congress to alter, qualify or supplement it [general maritime law] as experience and changing conditions require." *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 43 and *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, 386. It follows that under the FICA and the FUTA, "there is no reason why it (Congress) may not bring them (maritime rules) into relative conformity to the common law rules * * * if the change be countrywide and uniform in operation." *Panama R. R. Co.* v. *Johnson*, 264 U.S. at 388.

The common law rules in the FICA and FUTA address themselves to issues of fact. These issues must be decided by the trial court.

The Court of Appeals on remand failed to consider the factual issues raised by the application of the common law rules in the FICA and the FUTA governing maritime standards. The Court of Appeals felt that "maritime standards," without more, as a matter of law, required a conclusion of "employee" status for the captains and crewmen.

The Court of Appeals attempt to by-pass the issues of fact and dispose of the litigation on a pure question of law was wrong. The employer-independent contractor distinction is a fundamental fact of business life which cannot be abolished except by specific legislation.

Unless the judgment following remand is vacated, the petitioners will be denied any opportunity for a trial on the factual issues under the correct theory of law.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Court of Appeals instructing the District Court to dismiss the complaints should be vacated and the case be remanded to the District Court for consideration of petitioners' motion for a new trial.

Respectfully submitted,

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August 1970

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25674

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

(November 6, 1968)

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

HUNTER, *District Judge:* These tax refund cases involve similar questoins of law and fact, and were consolidated by agreement of the parties. The sole question presented is whether fishermen (captains and crews) operating menhaden fishing boats owned by the taxpayers, were their employees for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) within the meaning of Sections 3121, et seq., and 3306, et seq., of the Internal Revenue Code of 1954; 26 U.S.C.A. § 3121 et seq., and 3306 et seq. The district court, after a full trial, entered its findings of fact and conclusions of law. It concluded that for the purposes of the two Acts the fishermen were not employees of the taxpayers. The Government appeals and raises two specifications of error: First, that the district court erred in ignoring principles of general maritime law in its evaluation of the relationship between the taxpayers and the fishermen. The second error as-

serted that even in the absence of the principles of general maritime law, this record establishes as a matter of law that the captains and crews were employees of the respective taxpayers.

All agree that both Acts impose taxes upon employers measured by the compensation paid to employees, and as defined by the statutes for our purposes is the same. Section 3121(d) reads in pertinent part:

> The term "employee" means—
>
> (1) any officer of a corporation; or
>
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * *[1]

and Section 3306(i) reads:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

The present definitions of the term "employee" have a common genesis. The Supreme Court in 1947, because of a lack of decisional uniformity in defining "employee" under the Social Security Act, decided the cases of *United States* v. *Silk*, 331 U.S. 704; and *Bartels* v. *Birmingham*, 332 U.S. 126, therein setting forth broad general guide-

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[1] "Succeeding subsections specifically include in the category of employees persons engaged in a number of quite irrelevant occupations such as agent or commission drivers distributing specified products, full time life insurance salesmen, certain home workers and traveling salesmen." *United States* v. *Thornson*, 282 F. 2d 157, 158, ftn. 1 (C.A. 1, 1960). Fishermen were not included in this group.

lines to courts and agencies. As a consequence of these decisions, the Treasury Department proposed a new regulation defining the employer-employee relationship on the basis of an economic reality test. This proposed regulation caused considerable criticism in Congress and led to enactment in June, 1948, of J.H. Resolution 296 (62 Stat. 438) over President Truman's veto. The legislative history of this resolution makes it clear that the Congress meant to and did emphatically reject the economic reality test proposed by the Treasury Department, but did *lend* its approval of the Supreme Court decisions as they were interpreted by the Senate Committee.[2] Thereafter, amendments were enacted which redefined the term "employee." These amendments have been carried over into the Revenue Code of 1954 as heretofore quoted.[3] This common-law concept is described in the current Treasury Regulations on Employment Tax (1954) Code, Section 31.3121(d) 1(c):

> § 31.3121(d)-1 *Who are employees.*
>
> * * * * *
>
> (c) *Common law employes.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

---

[2] "In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." (2 U.S.C. Cong. Serv. (1948), p. 1785.)

[3] The legislative history of the amendments was considered by this Court in *United States* v. *Crawford Packing Company*, 330 F. 2d 194, 195 (1964), and by other courts in various cases including *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1st, 1960); *Ringling Bros. Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 869 (C.A. 2d, 1951); *Party Cab Co.* v. *United States*, 171 F. 2d 87, 89-91 (C.A. 7th, 1949); and *Hoosier Home Improvement Co.* v. *United States*, 350 F. 2d 640 (C.A. 7th, 1965).

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services.

In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Against this background the record here shows that the appellee-taxpayers, owners of menhaden fishing boats contracted verbally with captains, selected by them, to catch menhaden fish. The owners relinquished control of

the boats to the captains who staffed and provisioned them as they saw fit without interference from the owners. The captains agreed, without a guarantee of earnings of any kind, to make fishing trips for a season and to return the catches to a plant designated by the owners. The boat owners paid the captains an agreed price for each 1,000 fish caught and delivered. In addition to the price paid per 1,000 fish unit, taxpayers also paid the captains an additional amount per unit as a "bonus." Payments were made to the crew in such amounts as the crewmen and captain negotiated, based on the number of units of fish the crewmen helped to catch. The district judge concluded that the degree of control was not such as to create the relationship of employer-employee between the owners and the captains and crewmen.

The Government suggests that we promulgate a new test in this area by applying principles of General Maritime Law in the determination of whether the captains and crews were the employees of the respective taxpayers, and alternatively, argues that even in the absence of General Maritime Law principles, the record here conclusively establishes that under the traditional "common law test" included in the regulations, the captains and crews were employees of taxpayers.

Does a realistic application of common law tests require the relationship of the owners to the captains and crews be evaluated under principles of general maritime law? The "ancient solicitude of courts of Admiralty for those who labor at sea continues unchanged, despite the progress from canvas sails to diesel engines."[4] In non-tax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seamen. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the

[4] *Hudspeth* v. *Atlantic and Gulf Stevedores, Inc.*, 266 F. Supp. 937.

vessel is the employer unless the vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

However, the first matter to consider in any tax case is: What are the words of the statute? The words of the statute here are clear and explicit. The determination of the relationship is to be made on the basis of common law tests. It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA. Moreover, maritime law was urged as a controlling factor by the Government in *United States* v. *Crawford Packing Company* (supra). There, the proposition was extensively briefed and argued to this Court, which sustained the trial court's findings and conclusions in *Crawford*, and sub silentio rejected the government's maritime-oriented definition of "employee" for tax purposes. We note that in 1967 the Treasury Department unsuccessfully proposed to Congress that the definition of "employee" under 3121(d), Internal Revenue Code, be amended to include all captains and crewmen of commercial fishing boats, with the exception of fishermen who chartered boats from owners, who, in turn, had no interest in the catch.[5] Had the Treasury's pro-

[5] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), 90th Congress, 1st Session. It was reported out of the Senate Finance Committee, Sen. Rept. No. 744 on November 14, 1967, 90th Cong. 1st Sess., p. 320, stating that the proposed amendment "identifies captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship."

posal been accepted, it would have mooted the issue in this case. The Committee's rejection of the proposal indicates to us Congress's intention to retain the common law control test as the sole test for defining "employee" for tax purposes, whether they be maritime personnel or other types of employees.[6]

Questions of maritime law aside, the Government presses with vigor the argument that the facts here are such as to preclude the decision of the district court. The district court delineated with some elaboration the relationship between the owners and the captains and crewmen. We refer to the findings of that court which makes it unnecessary for us to state the facts in detail. *Webb, Inc., et al* v. *United States*, 271 F. Supp. 249. Here, as in *Crawford*, there is no difficulty in stating that the question of status is to be determined under common law rules. This case is difficult, as have been others like it of recent vintage. The following decisions in this circuit, on facts substantially similar to those in this case, have concluded that the workers and captains were not employees within the meaning of the two acts: *Crawford Packing Company* v. *United States*, 228 F. Supp. 549, aff'd 330 F. 2d 194 (5th Cir., 1964); *Star Fish and Oyster Company* v. *United States*, 223 F. Supp. 402 (S.D. Ala., 1963); *Williams Packing and Navigation Company* v. *Enocks*, 176 F. Supp. 168 (S.D. Miss., 1958), aff'd 291 F. 2d 402 (5th Cir., 1961), reversed on jurisdictional grounds, 307 U.S. 1; *Williams Packing Company* v. *United States*, Civil Action No. 2631 (S.D. Miss., 1964);

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[6] The bill (H.R. 12080) was referred to a committee of conference, Conference Rept. No. 1030, Dec. 11, 1967, 90th Cong., 1st Sess. The Report, at p. 74, disclosed that "The Senate recedes" with respect to its amendment of Section 3121(d), Internal Revenue Code. It is interesting to note that H.R. 12080, as passed by the House of Representatives, proposed various amendments to sections of the Internal Revenue Code, but no attempt was made by the House of Representatives to alter the definition of "employee" in Section 3121(d), nor was the status of fishermen mentioned. House Rept. No. 544, August 7, 1967, 90th Cong., 1st Sess. p. 144.

Sea Garden Corporation, et al v. *United States*, No. 64-9-Cir-J (M.D. Fla., 1965); *Gulf Boats, Inc.* v. *United States*, No. 2368 (S.D. Miss., 1962). On the other hand, courts have concluded, also on facts close to this case, that the captains and deck hands were employees. *Jackson* v. *Phinney*, 266 F. Supp. 835 (W.D. Tex., 1967); *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. of Claims, 1965); *Cape Shore Fishing Company* v. *United States*, 330 F. 2d 961 (Ct. of Claims, 1964); *Capital Trawlers, Inc.* v. *United States*, 324 F. 2d 506 (1st Cir., 1963). The excellent briefs point to many cases, but these suffice to reveal the diversity of thinking. There is a hankering for something definite and absolute, but the jurisprudence teaches us that there is no perfect and unchanging formula.

The Government's argument that a pure question of law is presented here does not conform to the weight of authority. Under the rule of *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that here there is ample evidence to support the finding of the district court. It might have found otherwise on the evidence adduced, but since we cannot say that those which were made were "clearly erroneous," we accept them under the mandate of Rule 52(a), F.R.C.P. Accepting these findings, the ultimate conclusion that the captains and crewmen were not employees necessarily follows. *United States* v. *Crawford Packing Company* (5th Cir., 1964), 330 F. 2d 194. The judgments for the taxpayers are affirmed.[7]

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[7] The average crew consisted of 24 men. Each captain selected his own crew and controlled them. The question of whether or not the crew members were "employees" of the captain for the purposes of Federal Insurance Contributions Act taxes and Federal Unemployment Act taxes is not before us.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25674

UNITED STATES OF AMERICA, APPELLANT

versus

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

---

(April 27, 1970)

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

PER CURIAM: On March 31, 1970, the Supreme Court of the United States rendered its opinion and issued its decree vacating the judgment of this Court and remanded for further proceedings. Taxpayers are the owners of boats used in commercial fishing. The fishing is carried out through contractual arrangements with boat captains who staff the boats and manage their day-to-day, operation. The crucial legal issue is whether the captain and crewmen are the "employees" of the owners within the meaning of the Federal Insurance Contributions Act (26 U.S.C.A. 3100, et seq.) and the Federal Employment Tax Act (26 U.S.C.A. 3300, et seq.). This

Court, 402 F. 2d 956, agreed with the district court, 271 F. Supp. 249, that the statutes' prescription of "common law rules" barred application of maritime standards in making this determination. Based on that legal premise, we concluded that the decision of the district court that the captains and crewmen were not employees of the taxpayers should be affirmed.

The Supreme Court held that this Court "erred in declining to judge the status of the captains and crewmen against the standards of maritime law." This holding, coupled with our earlier conclusion that under maritime law the captain is the agent of the owner and the crew hands are employees, leaves no room for further argument as to the appropriate disposition of this case.

Accordingly, the Court denies the taxpayers' request for further proceedings here; the case is remanded to the district court with instructions to dismiss the taxpayers' complaints.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25674

[Filed Jun. 4, 1970, U. S. Court of Appeals, Edward W. Wadsworth, Clerk.]

UNITED STATES OF AMERICA, APPELLANT

versus

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

(June 4, 1970)

ON PETITION FOR REHEARING

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3121. DEFINITIONS.

(a) * * *

* * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

* * * *

[26 U.S.C. (1952 ed., Supp. II) 3121.]

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)-1

* * * * *

§ 31.3121(d)-1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom services are performed the legal relationship of employer and employee.

(2) Generally such relationship exists when the persons for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the

pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * *

(26 C.F.R. 31.3121(d)-1.)

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31-.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods

for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

[26 C.F.R. 31.3306(i)-1.]

SUPREME COURT, U.

No. 828

In the Supreme Court of the United States

OCTOBER TERM, 1916

W. M. WEBB, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Barnstable, The, 181 U.S. 464	9
Bartels v. *Birmingham*, 332 U.S. 126	7
Carrier Dove, The, 97 Fed. 111	8
Cromwell v. *Slancy*, 65 F. 2d 940	8
Enochs v. *Williams Packing Co.*, 370 U.S. 1	7
Justillian v. *Versaggi*, 169 F. Supp. 71	9
Norland, The, 101 F. 2d 967	8
Panama R. R. Co. v. *Johnson*, 264 U.S. 375	10
Peters v. *Rohrman*, 272 Fed. 338	8
Southern Shell Fish Co. v. *Plaisance*, 196 F. 2d 312	9
United States v. *Silk*, 331 U.S. 704	7
United States v. *Webb*, 397 U.S. 179	3, 4, 6, 9, 10

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 3121	2
Sec. 3306	2
Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Sec. 33 (46 U.S.C. 688)	8

Miscellaneous:

Treasury Regulations on Employment Tax (26 C.F.R.):	
Sec. 31.3121(d)-1	2
Sec. 31.3306(i)-1	2

405-620 70

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 529

W. M. WEBB, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court are reported at 271 F. Supp. 249. The first opinion of the court of appeals (Pet. App. 1a–8a) is reported at 402 F. 2d 956. The opinion of the court of appeals after remand from this Court (Pet. App. 9a–10a) is reported at 424 F. 2d 1070.

JURISDICTION

The judgment of the court of appeals following remand from this Court was entered on April 27, 1970 (Pet. App. 9a). A petition for rehearing was denied on June 4, 1970 (Pet. App. 11a). The petition for a

writ of certiorari was filed on August 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly instructed the district court to dismiss petitioners' complaints by virtue of its holding, as a matter of law, that the captains and crews on fishing boats owned by petitioners were employees for the purpose of the Federal Insurance Contributions Act, Sections 3121, *et seq.*, of the Internal Revenue Code of 1954, and the Federal Unemployment Tax Act, Sections 3306, *et seq.*

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of Sections 3121 and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(d)-1 and 31.3306(i)-1 of the Treasury Regulations on Employment Tax are set forth in the Appendix to the petition (Pet. App. 12a–15a).

STATEMENT

Petitioners in these consolidated cases are engaged in the business of fishing for menhaden, an inedible fish which is processed and used for a variety of industrial purposes. Their business activities embrace ownership of fishing boats, fishing for the menhaden both in the Atlantic Ocean and the Gulf of Mexico through contractual arrangements with boat captains, and the disposal of the catch to fish processing plants. (R. 317, 319.)[1]

[1] "R." references are to the record appendix filed when this case was previously before this Court.

Each petitioner fully equipped his vessel for menhaden fishing, made and paid for all repairs and insurance on the boats and then secured the services of an experienced fisherman to be captain of the vessel. The arrangement between captain and owner was oral and generally lasted an entire season, although either party was free to terminate the relationship at the conclusion of any fishing trip. Once a captain was selected, the boat was turned over to him and he assembled and supervised a crew. (R. 319–320.)

Petitioners fixed the number of crewmen to be paid and also fixed the pay scale of the crew. The compensation of the captains and crew was measured by the volume of the catch, and neither captains nor crew were guaranteed any earnings if they failed to catch any fish. Petitioners determined the time and general area where the fishing would take place and designated the processing plants to which the catch was to be delivered. However, once the trip commenced, the captain managed the details of the operation and the manner of fishing. (R. 317, 320–324.)

Petitioners filed federal employment tax returns for the periods in issue and paid the employer's share of the Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes due on the earnings of the captains and crewmen. Claims for refund were timely filed, and, after the expiration of six months, petitioners commenced these refund suits. (R. 334.)

This case was previously before this Court in *United States* v. *Webb*, 397 U.S. 179. It was initially tried without a jury in the District Court for the